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No. 90.

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Supreme Court of the United States

No. 90
October Term, 1902.

ANTON MENCKE,
Libelant, Petitioner,

vs.

A CARGO OF JAVA SUGAR EX SHIP BENLARIG, WHEREOF ARBUCKLE BROTHERS ARE
Claimants, Respondents.

Brief for Respondents.

WILHELMUS MYNDERSE,
Advocate.

Supreme Court of the United States.

ANTON MENCKE, master of the British ship BENLARIG,
Libelant, Petitioner,

against

A CARGO OF JAVA SUGAR, whereof ARBUCKLE BROS. are
Claimants, Respondents.

October Term, 1902.
No. 91.

BRIEF FOR RESPONDENTS.

This action comes before the Court under a writ of *certiorari* issued to the Judges of the United States Circuit Court of Appeals for the Second Circuit (*Writ of Certiorari, p. 93*).

The action was instituted by the master of the ship *Benlarig*, in the District Court of the United States for the Eastern District of New York, May 26, 1899, claiming balance of freight from a cargo of Java sugar shipped in Java and delivered in New York in the amount of $1,929.52 (*Libel, pp. 1-3*).

After the institution of the suit, the claimants of the sugar paid to the libelant, on account of such freight, the sum of $463.40, thereby reducing the libelant's claim to $1,466.12 (*Ans. to 1st. Int., p. 15*).

The claimants defended against the reduced claim upon averments that the libelant had not made due delivery of the sugar, in that he did not deliver the same at the place ordered by the claimants, thereby involving the claimants in expenses for lighterage in the amount of $1,466.12,

which "loss and damage" they prayed leave to recoup (*Ans., pp. 13-14*).

The District Court entered a decree in favor of the libelant (*Decree, pp. 85, 86*), an opinion being filed by the District Judge (*Opinion, pp. 81-85*).

Upon an appeal taken by the respondents, the United States Circuit Court of Appeals, after a hearing, filed its opinion that the decree of the District Court should be reversed, with costs (*Opinion, pp. 88-91*), and entered an order accordingly, directing that the cause be remanded to the District Court with instructions to dismiss the libel, with costs (*Order, p. 92*).

At that stage of the proceedings the writ of *certiorari* issued from this Court.

Statement of Facts.

The ship *Benlarig* was chartered in London, July 1, 1898, by her owners, Watson Bros., to Erdmann & Sielcken, merchants, of Java (*Charter-Party, pp. 3-7*).

The principal portion of the charter-party was in print It provided that the *Benlarig*, then bound on a voyage for Java, should after discharging the cargo then aboard, load a full cargo of sugar at one or more ports on the north coast of Java, and therewith proceed to Barbadoes, and thence to Queenstown or Falmouth for orders to discharge at a safe port in the United Kingdom, or on the continent of Europe between Havre and Hamburg.

There was an alternative provision that the ship might be ordered from Barbadoes to Delaware Breakwater for orders to discharge at New York, Boston, Philadelphia, or Baltimore.

There was a further provision that certain concessions in the charter hire should be made to the charterers, if the vessel should be ordered direct from Barbadoes to an authorized European or American port of discharge, without being required to proceed to a port of call at Queenstown, Falmouth or Delaware Breakwater.

The *Benlarig* took her cargo under this charter in due course.

Upon arrival at Barbadoes the vessel was ordered to proceed to New York (*Mencke, p. 17*).

Bills of lading had been issued for the cargo, reciting shipment by the charterers, Erdmann & Sielcken, and providing for delivery to Winter & Smillie, or to their assigns upon payment of freight as per charter-party. The bills of lading stipulated for the application of all the conditions and exceptions of the charter party (*Exhs.* 3, 4, 5, 6, *pp. 18–20*).

The *Benlarig* arrived in New York April 14 (*Libel, p. 2*).

In the meantime the claimants, Arbuckle Bros., had purchased the cargo, and were the holders of the bills of lading (*Mencke, p. 22; Gilmour, p. 74*).

On April 15 the ship's agent applied to Arbuckle Bros. for orders to a discharging berth (*Exh. 9, p. 22*).

On the same day Arbuckle Bros. ordered the vessel discharged at their refinery, foot of Pearl street, Brooklyn (*Exh. 7, p. 21*).

The designated berth was above the Brooklyn Bridge, and the ship's agent made reply that it would be impossible for the *Benlarig* to pass beneath the bridge, because of the vessel having steel masts all in one piece, and that she would be unable, therefore, to proceed to the dock to which she had been ordered. He applied for further orders for discharging berth (*Exh. 11, pp. 23-24*).

It was thereupon agreed between the parties that the cargo should be discharged into lighters below the Bridge without prejudice to the rights of the parties under the charter party (*Exhs. 12, 13, pp. 24-25; Ans. to 2d Int.; Amendment to Libel, p. 12*).

Thereupon Arbuckle Bros. designated a pier in Atlantic Basin for such discharge of the sugar (*Exh. 14, p. 25*).

Upon discharge of the sugars they were lightered from Atlantic Basin to the claimants' refinery, Pearl street, Brooklyn, at a cost of $1,466.12 (*Gilmour, pp. 75–76*).

The libelant has conceded that the cost was reasonable in amount (*Gilmour, p. 76*).

The *Benlarig* was of medium size, measuring 1,692 tons. Her masts were of steel. There was a peculiarity in their

construction, in that, instead of being built in three or more sections, such as foremast, foretopmast, foretopgallant mast, foreroyal mast, foreskysail mast, each section being stepped on the other, they were built in a uniform construction of cylindrical plates riveted together, covering internal angle iron braces (*Mencke, pp. 28, 32, 35*). The height of the mainmast was about 145 feet above the water line, and the foremast was within a few inches of the same height (*Mencke, p. 27; Bentz, p. 35*).

The central span of the Brooklyn Bridge was 135 feet above mean high water (*Martin, p. 45*), and the clearance was only 140 feet above low water (*Spaulding, p. 38*).

In order to pass beneath the Bridge at low water it would, therefore, be necessary for the *Benlarig* to remove about five feet of her foremast and her mainmast. Unless by such removal of that much of her masts, she could not reach the designated dock at the claimant's refinery, except by going through Long Island Sound and through Hell Gate.

The question in the case is whether the *Benlarig* was bound to make delivery of the sugar at the claimants' refinery, either by cutting her masts, or by going through Long Island Sound, or by employing lighters.

The portions of the charter-party which have been deemed material to the dispute are as follows:

> "To discharge always afloat, either at a safe port
> " in the United Kingdom or on the continent of
> " Europe between Havre and Hamburg, both in-
> " cluded, Rouen excluded, or at option of charter-
> " ers to order vessel from Barbadoes to proceed to
> " Delaware Breakwater for orders to discharge at
> " New York, or Boston, or Philadelphia, or Balti-
> " more, or so near the port of discharge as she
> " may safely get, and deliver the same, always
> " afloat, in a customary place and manner, in such
> " dock as directed by charterers" (*Charter-Party Art. 1, p. 4*).
>
> "All goods to be brought to and taken from
> " alongside of the ship always afloat at the said
> " charterers' risk and expense, who may direct the
> " same to the most convenient anchorage; lighter-
> " age, if any, to reach the port of destination or

"deliver the cargo at port of destination, remains "for account of receivers, any custom of the port "to the contrary notwithstanding" (*Charter-Party, Art. 4, p. 5*).

These extracts appear in the regular printed form of the charter-party, except that in Article 1 the names of the specified ports were in writing, and in Article 4 the words "always afloat" were in writing.

The undisputed proofs show that fully eighty per cent. of the sugar coming to the port of New York during recent years has been discharged above the Brooklyn Bridge (*MacDougall, p. 48; Smith, p. 58; Gilmour, p. 75*).

The undisputed proofs further show that it has been the custom for vessels, whose masts in ordinary state do not permit them to go under the Bridge, to house the top-gallant masts and then to proceed above the Bridge (*Smith, p. 61; Elliott, p. 63; Brooks, p. 67*). In exceptional cases where a vessel has carried a mast in a single piece too tall to pass beneath the Bridge there have been at least three instances where the vessel has cut the mast (*Elliott, pp. 63, 64; Brooks, pp. 68, 69.*

The number of vessels so constructed is extremely small, probably not more than a dozen in the entire world (*MacDougall, p. 49; Gilmour, p. 76*).

Vessels with extraordinary masts or vessels that are not willing to incur the expense and trouble of housing the upper masts ordinarily make provision in their charters that they shall not be required to go above the Bridge (*Smith, p. 58; Brooks, p. 67*).

The owners of the *Benlarig* seem to have known at the time they effected the charter to Erdmann & Sielcken that the *Benlarig* could not pass beneath the Bridge (*Rossen, pp. 80, 81*).

POINTS.

First.

THE DISCHARGING BERTH TO WHICH THE BENLARIG WAS ORDERED WAS SAFE FOR VESSELS OF HER CLASS, AND A CUSTOMARY PLACE OF DISCHARGE; AND SHE SHOULD HAVE PROCEEDED THERE, OR SHOULD HAVE DELIVERED HER CARGO THERE OTHERWISE AT HER OWN EXPENSE.

The extracts from the charter are usual provisions in Java Sugar charters (*Gilmour, p. 77*).

The printed forms are used, not only to cover one branch of business, but all branches, and contain, therefore, general provisions adapted to a wide range of ports.

There were certain obligations resting upon the *Benlarig* prior to her arrival at the port of discharge, and certain others resting upon her after arrival at the port of discharge.

The obligations resting upon her prior to her arrival at the port of discharge were to proceed from the port of call at Barbadoes "to discharge at New York * * * or "so near the port of discharge as she may safely get" (*Charter-party, Art. 1, p. 4*).

The words "so near the port of discharge as she may "safely get" (*Charter-party, p. 4*) would not often be restrictive in connection with such a port of discharge as New York, Boston, Philadelphia or Baltimore. They would frequently be pertinent in the case of some ports, where navigation is subject to interruption by ice or where shallow bars forbid entrance to other than small craft.

In case of war New York might become an unsafe port, and then the provision would find application.

In fact, however, the steamer did actually reach the port of New York, and it is material, therefore, to consider only the obligations which rested upon her after her arrival at that port.

Such obligations were defined in the provision that the ship, upon arriving in port, should deliver her cargo

" always afloat in a customary place and manner, " in such dock as directed by charterers" (*Charter "party, fol. 1, p. 4*).

The sequence of the three specified conditions is significant.

First, there is a general provision that the vessel must lie "always afloat."

Next, there is a provision still further restricting the charterers in providing that the place of discharge must be a customary place, and the manner of discharge a customary manner.

Finally, within these restrictions the shipowners agreed to send their vessel to the dock designated by the charterers.

The charter was made specifically for the transportation of sugar, and New York was designated as one of the ports to which the vessel might be sent.

The proofs are that it is customary for eighty per cent. of the sugar arriving in New York to be delivered above the Brooklyn Bridge (*MacDougall, p. 48; Smith, p. 58; Gilmore, p. 75*).

The depth of the water at the place designated by Arbuckle Bros. was ample for the vessel to lie "always afloat" (*Gilmour, p. 79; Mencke, p. 31*), and the "largest vessels go there" (*Smith, p. 58*).

If the charter had specifically stated that discharge was to be made at Havemeyer's refinery or Arbuckle's refinery or at any other of the great refineries on the East River, above the Bridge, the shipowner could not make an arguable contention that he was relieved from delivering the cargo at the designated dock by reason of his masts being too tall to pass beneath the Bridge.

In view of the character of the cargo, the naming of the port, the customary place of discharge of sugars in such port, the charter is to be taken as an engagement by the shipowner to make delivery of the sugar, if so called upon, above the Bridge.

Where a man undertakes by contract to do a particular act, the impossibility of performing the act is no defense

to a suit for breach of contract, unless performance be made impossible in some manner not reasonably to have been foreseen, by an act of God or some fortuitous occurrence.

Nor is a person failing to perform an impossible condition precedent entitled to sue upon a contract, although in the contingency referred to he may sometimes be granted a *quantum meruit* in an action of *quasi* contract.

Paradine v. *Jane, Aleyn 27.*
Jacobs v. *Credit Lyonnais, L. R., 12 Q. B. Div., 589, 603.*
Cutter v. *Powell, 6 L. T., 320.*
Hopper v. *Burness, L. R., 1 C. P., 137.*

Under what principle, therefore, can the *Benlarig* be relieved from her obligation to proceed to the dock designated, or in default thereof pay the cost of delivering her cargo at such dock?

The contracting parties provided that if the vessel could not reach her "port of discharge" she should proceed as near thereto as she might safely get. They did not make any similar or kindred provision in respect of *the place of discharge* within the port; although such provision might have been made, as in the case of the *Euxine*, where it was provided that the vessel should proceed to London Surrey Commercial Docks, "or so near thereunto "as she may safely get," &c.

Dahl v. *Nelson, L. R., 6 App. Cases, 38.*

The only restrictions which the shipowners sought in respect of the place of discharge were that the vessel should be "always afloat," and that it should be a "customary place."

By the words "customary place" was meant a place usual for vessels of like size and like cargoes, having the usual attributes which strangers to a vessel may assume she possesses, or are charged with knowing that she possesses.

Devato v. *823 Barrels of Plumbago, 20 Fed. Rep., 510.*
The Port Adelaide, 38 Fed. Rep., 753.

The Mascotte, 48 Fed. Rep., 119; 51 Fed. Rep., 606.
The Boston, 1 Lowell, 464; Fed. Case No. 1671.

If the learned District Judge intended to hold (*Opinion, p. 83*), that the libelant's obligation to deliver the cargo "in a customary place and manner" applied only after a designated dock had been reached, he was in error, and assignment of error was accordingly lodged. It may be doubted whether he intended so to hold, although his words are susceptible of such construction. But they may also be construed differently.

We do not contend that shipowners would be bound to the specific performance of a contract that would be ruinous to them if literally performed, but we do contend that if they make a contract and do not perform it, either because they cannot conveniently perform it, or because they cannot, from the nature of things, and without the intervention of any excusing casualty, possibly perform it, they must make good the resulting damages.

Fortunately in this case there was an easy alternative to specific performance open to the shipowner (in case the vessel did not wish to cut her masts) by incurring the cost of delivering by other means the cargo at the required place of delivery.

The libelant rested his case upon his own deposition, showing the height and construction of the *Benlarig's* masts, upon the testimony of the Bridge superintendent showing the height of the Bridge, and upon the testimony of the Government surveyor, showing the rise and fall of the tide.

The claimants on their part summoned merchants and ship agents, who have given their construction of clause 1 of the charter.

Mr. MacDougall testified that the provision is a usual one (*MacDougall, p. 46*), and that under the construction given by custom,

" ships lower the topgallant mast so as to be able " to go under the Bridge " (*MacDougall, p. 47*).

Mr. Snow, for forty-two years in the shipping business in New York, recognized the provisions of the charter as usual (*Snow, p. 52*), and said:

" I consider the custom is established for the ves- " sel to go above the Bridge.
" Q. Do you know how serious a thing it is for a " vessel to cut her masts where they are all in one " piece? A. I only recollect of one ship consigned " to us, the masts of which being too high, was thus " cut, and my impression is that the actual cost of " it might have been thirty to forty dollars " (*Snow, p. 52*).

Again, he said that the cutting of the masts was not a serious matter at all (*Snow, p. 53*).

Mr. Smith, of Smith & Shipper, showed familiarity with the form of charter (*Smith, p. 57*), and testified:

" I have always considered the custom in New " York was for the vessel to discharge anywhere in " the port of New York where she can safely lie " afloat, either above or below the Bridge, unless " stipulated especially in the charter that the ves- " sel was not to go above the Bridge " (*Smith, p. 58*).

Mr. Elliot, of the house of Livermore & Company, speaking from an experience of twenty years, after identifying the form of charter "as usual" (*Elliot, p. 62*), testified:

" The custom is, the charterer has a right to " order the ship to a safe dock to discharge the " cargo.
" Q. And it she can't get there? A. I never had " that question come up – if she can't get there.
" Q. Have you had experience with vessels whose " masts were too tall to go under the Bridge? A. " As they stood, yes.
" Q. What has that experience been? A. Some " of them I have had to strike the topgallant mast, " and some I have had to cut the jigger-mast.

"Q. You have represented the vessels in those "cases? A. I have" (*Elliot, p. 63*).

And then again:

"The topgallant masts were housed.
"Q. Has that happened more than once, you have "cut the jigger-mast? A. I have had that hap-"pen to me, I think, three times; but I don't recall "just now more than one vessel where I had to do "it" (*Elliot, p. 63*).

To the same effect is the testimony of other witnesses (*Brooks, pp 67, 68; Gilmour, p. 77*).

Not only is it customary to discharge sugars above the Bridge, but the particular dock designated by Arbuckle Bros. was in every way a proper and usual dock.

"Q. Do you know the dock adjacent to Ar-"buckle's refinery? A. Do I know it? Yes; I have "been there."
"Q. What do you say as to whether it is a rea-"sonable and customary place to discharge sugar? "A. It is a reasonable and customary place to dis-"charge sugar" (*MacDougall, p. 48*).

"Q. What is the condition of water at Arbuckles' "refinery? A. The largest vessels go there
"Q. Can you say whether it is a usual and cus-"tomary place to discharge sugar? A. Yes" (*Smith, p. 58*).

"Q. How much water is there at your refinery? "A. Twenty-five feet at low water" (*Gilmour, p. 79*).

The extreme draft of the *Benlarig* was 21 feet 3 inches (*Mencke, p. 31*).

The expense of cutting the masts and the resulting injury to a vessel carrying masts of ordinary construction, if any, would be trifling, about thirty to forty dollars (*Snow, p. 52*). The mast could be repaired and restored to its former height at a total expense which probably would not exceed one-tenth of the cost of lighterage.

The cutting of the masts under such circumstances, for vessels unable otherwise to pass under the Bridge, not being an unreasonable or uncommon occurrence, cannot, therefore, be said to be outside of the reasonable intendment of the contract.

The District Judge gave undue consideration to a recent English case, *Re an Arbitration between Goodbody & Company and Balfour, Williamson & Company, 8 Asp. Mar. Law Cases, 503; 9 Asp. Mar. Law Cases, 69.*

In that case a cargo had been sold for delivery at "any safe port in the United Kingdom." The sellers, in performance of their contract, tendered bills of lading of the *Vanduara*, covering a cargo destined to "any safe port in the United Kingdom, Manchester excepted." The buyers refused to accept the documents. Thereupon the sellers, by arrangement with the shipowners, procured the erasure of the words, "Manchester excepted," and tendered the documents again. The buyers again refused them on the ground that the documents had been altered.

The Court held that the words, "Manchester excepted," in the bills of lading, imposed no restriction upon the purchaser inconsistent with the terms of the contract of purchase. Manchester was held to be not a safe port for the *Vanduara*, because of her inability to pass under the Runcorn Bridge, spanning the Manchester Ship Canal, unless she should be "wholly dismasted" (*p. 508*).

The respondents find no fault with the decision in the *Vanduara* case, but it has little or no bearing here. In the first place, Manchester had become a port at all only by the construction of a canal. The *Vanduara* was a ship of the usual type of construction, having her masts in sections. All of her royal masts, topgallant masts and topmasts might have been housed and yet she could not have reached Manchester because the Runcorn Bridge was too low to permit the lowest sections of her masts to pass. There was no showing that vessels of the size and class of the *Vanduara* ever entered Manchester, or that vessels engaged in the trade in which she was engaged ever delivered cargo there. There was a showing that she would require to be practically dismantled in order to reach Man-

chester--"wholly dismasted"; thirdly, the contract condition was specific in its provision for a "safe port."

The Circuit Court of Appeals properly distinguished the case (*Opinion, p. 90*).

The counsel for the libelant have in much detail reviewed cases arising under charter-parties involving the selection of a port of discharge.

It is scarcely profitable to try out each of those cases upon briefs.

Every such case has depended upon the particular engagement of the charter and upon the facts, and in none of the cases has the language been similar to the engagements between the libelant and the respondents respecting the use of the *Benlarig*.

When a Court holds that under an engagement for "a safe port" a vessel is not bound to lie in an open roadstead and discharge her cargo into lighters to send it over a bar which she cannot pass, the decision of the Court is not pertinent to the present case.

The Alhambra (1881), 6 P. D., p. 68.

Nor is it pertinent to the present discussion to show that a Court, in another case, has held that a vessel which had engaged to proceed to a "safe port" and to discharge her cargo "all at one port" is not bound to discharge part of her cargo at Sharpness, and then upon lighter draft proceed to Gloucester to complete her discharge, Gloucester and Sharpness being commercially distinct ports.

Reynolds vs. *Tomlinson* (1896), 1 Q. B., 586.

In another case, mentioned by libelant's counsel, the Court held, and apparently with good reason, though the conclusion does not seem to bear upon the present case, that when a vessel engages to go to "a safe port" and take on a cargo, she is not bound to take on such cargo in the port that she cannot cross the bar and get out of the port although she could safely lie afloat within the port.

Shield vs. *Wilkins*, 5 Wellsby (H. & G.), Ex., 304.

In another case the engagement was that the cargo should be brought to and taken from alongside the ship at merchant's expense "where she could lie always afloat and safe." There was not sufficient water at the quay designated by the charterers for her to lie alongside, and she was compelled to moor herself fifteen feet away and build a staging to the quay. Upon the terms of the engagement and the facts, there would seem to be no question that the decision of the Court imposing the cost of this method of discharge upon the charterers was correct, but it is difficult to see the application to the present case.

The Nifa (1892), Prob. Div., 411.

The libelant's counsel cites also a case where the charter-party provided for discharge at "a safe direct Nor-"wegian or Danish port" and the Court sustained the master's refusal to proceed under such a charter to Aalborg, the draft of his vessel being sixteen feet and Aalborg being seventeen miles up a river, which had at its mouth a bar carrying only ten or eleven feet. The anchorage outside the river was not safe. The conclusion seems sound, but it does not bear upon the *Benlarig's* case.

The Gazelle, 128 U. S., 174.

In another case, cited by the libelant's counsel, the vessel was bound to proceed to "a safe port between Havre "and Hamburg, both ports included * * * or so near "thereunto as she can safely get."

The vessel could not, as loaded, reach Hamburg until certain of her cargo had been lightered. She went as near to Hamburg as she could "safely get" and the expense of lightering from that place to Hamburg was quite properly put upon the charterer under his engagement to take cargo from alongside at his "risk and expense."

Hayden vs. *Irwin*, 3 Aspinall N. S., p. 212.

In the remaining case cited by the libelant the point involved was whether the charterer must pay demurrage to a vessel while she was waiting beyond her lay-days to

secure the use of the wharf designated by him for discharge, the wharf at the time being occupied by other vessels. The decision was that the charterer must pay demurrage, but we do not appreciate the bearing of the decision upon the present case.

Williams vs. *Theobald*, 15 Fed. Rep., 465.

In the case now under argument the *Benlarig* had reached her safe port, the port designated by the contract. She was ordered to a dock therein that was customary, and where she could lie "always afloat."

If the *Benlarig* had been ordered to discharge in an artificial interior basin which was not a usual place for vessels in the Java sugar trade to discharge, or which, by reason of some permanent physical feature, was inaccessible both to the *Benlarig* and to vessels of her size and class and trade, the decision in the *Vanduara* case would become applicable.

Second.

THE LIGHTERAGE CLAUSE OF THE CHARTER DOES NOT RELIEVE THE CHARTERERS FROM THEIR OBLIGATIONS TO PROCEED TO A DESIGNATED DOCK ABOVE THE BRIDGE AND THERE TO DELIVER THE CARGO.

It has been contended by the libelant that the burden of transportation from the place of actual discharge to the designated dock must fall upon the charterers, because of the lighterage clause, which reads as follows:

> "4. All goods to be brought to and taken from
> " alongside the ship, always afloat, at the said char-
> " terers' risk and expense, who may direct the same
> " to the most convenient anchorage; lighterage, if
> " any, to reach the port of destination or deliver
> " the cargo at port of destination remains for ac-
> " count of receivers, any custom of the port to the
> " contrary notwithstanding" (*Charter-party, p. 5*).

To give this clause the construction which has been contended for, sets the other clauses of the charter-party at na

Inasmuch as the contention was in a measure accepted by the District Judge, it calls for more serious consideration that the first statement of the proposition would seem to require.

The contention, if allowed its full range, would permit the vessel to refuse to proceed further and to insist upon discharging as soon as she reached a place from which lighterage to the dock desired by charterers was feasible.

The fallacy of the libelant's argument is made otherwise apparent by considering that where the vessel refuses to proceed to the dock designated, the liability for expense of carrying the cargo thither would be made to depend upon whether trucks, drays or railways were used to complete the distance or whether lighters were so used.

Any construction of the lighterage clause, the effect of which is to limit the choice of the charterers in respect of a dock for discharge, *beyond limiting it to a dock where the vessel can lie afloat and situated in a place customary for the delivery of the sugar*, is clearly repugnant to the contract.

The lighterage clause has reference at the most only to cases in which the vessel has already performed her whole contract.

There are many cases where the clause becomes operative and of importance, as where portions of the cargo need to be distributed to different destinations within the port, away from the dock originally designated; or again, where the vessel is relieved from proceeding to the designated dock because she cannot lie safely "always afloat" at such dock; or again, where she cannot reach the port itself; or again, where the charterers elect to have the vessel discharge at an anchorage; or again, where vessels ordinarily discharge at an anchorage, as in Havana.

As though to indicate the proper or contemplated application of the lighterage provisions, the clause gives to the consignee the right to order the vessel to a "convenient

anchorage," and this provision immediately precedes the stipulations respecting lighterages charges.

The lighterage clause, in substantially the form used in this charter, has had a long and wide use in charter-parties for many years (*McDougall, p. 48; Snow, pp. 52, 54; Smith, p. 57; Elliot, pp. 62, 63; Mackay, p. 72; Gilmour, p. 78*), and its reach is fully understood by the shipping world. It has no application, except to cases where the vessel is excused by other provisions in the charter-party from delivering her cargo at the dock desired by the consignees.

The libelant, in support of his contention, relies solely upon the argument of counsel. No witnesses have been called by him, to give to the clause the construction for which the libelant has contended, or any construction.

The claimants' witnesses, on the other hand, show in what way, through many years, the clause has been applied by merchants.

Mr. MacDougall says:

> "The custom is that that clause would only be-
> "come operative if there wasn't sufficient depth of
> "water for the vessel to go to the discharging
> "berth.
> "Q. And it has no other application then? A.
> "None" (*MacDougall, p. 49*).

Mr. Snow testified:

> "As I understand that custom requires that ves-
> "sel to go to Arbuckle's refinery and there deliver
> "her cargo of sugar, providing there is sufficient
> "water for her to float into that berth and lie there
> "at all times afloat.
> "Q. That is the way custom would always, as
> "far as you know, construe that clause? A. Yes,
> "sir" (*Snow, p. 55*).

And again, phrasing the rule well, he said:

> "Q. The question is whether this clause compels
> "the charterers to pay lighterage under all circum-
> "stances where lighterage is necessary? A. I don't
> "see the necessity of the lighterage.

" By the Court: Q. Supposing there is a neces-
" sity for it, who is to pay the lighterage? *A. If*
" *the ship had performed her duty and after that*
" *there was a necessity for it the charterer would*
" *have to pay it*" (*Snow, p. 55*).

And again:

" A. If she had performed her full duty and
" there still was lighterage to pay the charterer
" would have to pay it" (*Snow, p. 56*).

In this case the ship had not performed her duty because she had not proceeded to the customary place of discharge designated by Arbuckle Bros.

Mr. Smith testified:

" A. The lighterage clause I consider only refers
" to depth of water.
" Q. I don't want your opinion. Is there a cus-
" tom? A. Yes, sir.
" Q. What is the custom? A. That the vessel,
" if ordered to a dock like Matthiessen & Weeks'
" Refinery, where there is not sufficient water to
" lie afloat, that either sufficient cargo is taken out
" and lightered at the cargo's expense, or all the
" cargo.
" Q. The lighterage clause then applies to that
" kind of case? A. Yes" (*Smith, p. 58*).

And again:

" Q. Where the ship has performed her full duty
" under the charter-party, and notwithstanding
" that fact lighterage must be paid, and the charter-
" party contains a lighterage clause in the form of
" Clause 4, or what you call a similar form, is it
" not for the cargo under the custom of this port to
" pay the lighterage? A. Yes, if there isn't suffi-
" cient water where the vessel is ordered for the
" vessel to lie afloat" (*Smith p. 60*).

To apply the clause to this case.

We admit that if the *Benlarig* performed her full duty under the charter-party in going to the dock at Atlantic

Basin and there discharging her cargo, the lighterage charges must be borne by the charterers. But we contend that she did not perform her duty in making the discharge in the Atlantic Basin.

The *Benlarig* cannot absolve herself from the obligations placed by custom upon vessels of her size and general class and trade, by the plea that some detail of her construction placed her in a class by herself, unbound by custom.

Much stress is laid by libelant's counsel upon the concluding words of the lighterage clause, "any custom of the port to the contrary notwithstanding," and upon the fact that one of respondent's witnesses was not familiar with such modification of the clause.

But those words are of no import in the present case. They belong to cases where lighterage is a natural incident to the delivery of the cargo, or where it is contemplated by the parties or is ordered by the charterers.

It is only through misconception of the nature of respondent's defense that reliance can be placed on the lighterage clause.

That defense is that the libelant was bound by the charter-party to send his ship to respondents' stores, and, failing such performance, to make good to the respondents their damages, which fortunately happen to amount only to the cost of lighterage.

Third.

THIS ACTION HAS NOT BEEN BROUGHT BY THE LIBELANT FOR THE RECOVERY OF LIGHTERAGE CHARGES BUT FOR FREIGHT, AGAINST WHICH THE RESPONDENTS SEEK TO RECOUP THEIR DAMAGES.

The libel is declared to be "in a cause of contract" (*Libel, p. 1*).

It alleges non-payment of the freight stipulated in the charter and bills of lading and claims an unpaid balance of $1,929.52 (*Libel, Art. 7, p. 3*).

After the libel was filed the respondents paid the further sum of $463.40 (*Interrogation, p 15*), thereby reduced the balance of freight to $1,466.12, which equaled the amount of lighterage charges to which the respondents had been subjected (*Answer, Art. 10, p. 14; Gilmour, pp. 75, 76*).

The answer sets up a failure of the libelant to perform the contract of transportation, consequent damage in the cost of lighterage, and prays leave to recoup the amount of such damages against the libelant's demand (*Answer, Art. 8, Art. 10; Prayer, p. 14*).

It is essential to bear in mind the lines of the action.

Fourth.

WHERE DIFFERENT CONSTRUCTIONS OF A CONTRACT ARE POSSIBLE, SUCH CONSTRUCTION SHOULD BE CHOSEN AS MAY FAIRLY BE INFERRED TO HAVE BEEN THE INTENTION OF THE PARTIES, VIEWED IN THE LIGHT OF ALL FACTS.

The owners of the *Benlarig* chartered her to carry a cargo of sugar to any one of the several designated ports, among them, New York.

The usual place to discharge such cargoes in New York is above the Bridge, where fully four-fifths of the sugar is, and for many years has been, discharged. With perhaps a dozen exceptions all the vessels in the world are able to pass under the Bridge, by simply housing the light upper masts (*Gilmour, p. 76; Smith, p. 61; MacDougall, p. 49*).

The construction of the *Benlarig's* masts was not only unusual, but the style was novel (*Gilmour, p. 75*).

The heights of vessels' masts are not given in Lloyd's Register (*Snow, p. 54; Elliot, p. 64; Gilmour, p. 76*); nor is the height of their masts commonly known to the trade (*Eliot, p. 64*).

Arbuckle Bros. have a large business as refiners; they have acquired property on the deep water front to facilitate the delivery of cargoes to them without intermediate drayage or lighterage.

They go into the market and buy full cargoes of sugar that they may have the right to order vessels to their own refineries to discharge, for the purpose of saving expenses that would be incurred for lighterage or drayage when discharged elsewhere (*Gilmour, p. 77*).

They bought the cargo of the *Benlarig* upon the documents, and those documents required the vessel, on arriving at New York, to proceed to any customary place for discharge.

If there is any hardship in the case, well recognized principles of justice require that where one or two innocent parties must suffer it should be he who might the more fairly and reasonably have averted the situation which results in a loss to one of the two.

In the present case both parties must be taken to have known the height of the Bridge. The ship's agents actually, and the owners, therefore, presumably, did know it (*Rossen, pp. 80–81*).

The height of the *Benlarig's* masts was known to one party only. The charterers and the claimants had no reasonable way of ascertaining such height. There were no circumstances to put them upon their inquiry.

Masts of such height in one piece are so rare as not to charge merchants with the responsibility of investigation. It is more reasonable to require the shipowner to assert his disabilities and to insert in the charter-party due provision exempting him from sending his vessel above the Bridge (*Smith, p. 58; Brooks, p. 67*).

As regards the draft of the vessel, the shipowner has been careful in all parts of the charter-party to protect himself. The charterers have thereby been put to the peril of ascertaining the actual draft of the vessel, and of selecting waters accordingly. The shipowner should have provided for himself similar protection in respect of other obstacles than shallow water if he desired protection.

The vendor of an article sold without opportunity of in-

spection, for a known purpose, warrants the article to be reasonably adapted for that purpose.

Jones v. *Just*, *L. R.*, *3 Q. B. Div.*, *196*, *202*.
Dushane v. Benedict, *120 U. S.*, *630*, *636*.

The owner of a sea-going vessel warrants her to be seaworthy by implication, if not specifically.

So, where a shipowner charters his vessel for a designated service, he must be deemed to warrant that the vessel shall not be prevented from performing that service by lack of usual and reasonable features of construction and equipment, for a charter is usually signed, as this one was, while the vessel is on the sea.

If a shipowner charters his vessel for a named port without qualification of any kind, he warrants that her cargo shall not be prevented from reaching that port by reason of the character or construction of the vessel, for his undertaking is to carry the cargo to the designated destination "unless prevented by the dangers of the seas "or other unavoidable casualties."

Hunter v. *Prinsep*, *10 East*, *378*, *394*.

Even where by the charter he reserves the alternative, "or so near thereto as the vessel can safely get," he is not excused by the draft of his vessel or by any other circumstances of her construction from taking the goods to within ordinary lighterage distance of the destination, *i. e.*, within the ambit of the port.

Schilizze v. *Derry*, *4 El. & Black*, *873*.
Metcalf v. *Britannia Iron Works Co.*, *L. R.*, *2 Q. B. Div.*, *423*.
Dahl v. *Nelson*, *L. R.*, *6 App. Cases*, *38*, *50*, *51*.

If he charters his vessel for a particular country without naming the port, the character of his vessel will not excuse him from delivering the cargo in a port where such cargoes are usually and generally delivered.

Smith v. *Davenport*, *34 Maine*, *530*.
Parsons on Shipping, *Vol. I.*, *222*.

Nor will it excuse him where the port is named, but no particular district therein is excepted, from delivering the cargo in the district where such cargoes are usually and customarily discharged.

Port Adelaide, 38 Fed. Rep., 753.
The Mascotte, 48 Fed. Rep., 119; 51 Fed. Rep., 606.

When the privilege has been specifically given to the charterer to designate the dock of discharge it would be illogical to say that his position was less favorable than it would be if he did not hold such specific privilege. He is restricted only in naming docks "in a customary place" (*Charter-party, p. 4; The Boston*, 1 Lowell, *464*), and where the vessel may lie "always afloat."

The District Court created a new contract for the parties when it curtailed the charterer's privilege by holding that the dock must be one not only accessible to vessels having the unusual features of this vessel, but that also it must be accessible by a convenient harbor route.

It would be a lesser modification of the contract to impose upon the shipowner the obligation of going around Long Island Sound and through Hell Gate, which was a feasible route (*Gilmour, pp.* 76, 77), than to compel the claimants to take their sugar at the Atlantic Basin.

Fifth.

THE SHIPOWNERS ARE IN DEFAULT UNDER THE LITERAL REQUIREMENTS OF THE CHARTER-PARTY.

They have not delivered the cargo of the *Benlarig* at the designated destination.

Under the contract they are entitled to nothing.

Hopper v. *Burness, L. R., 1 C. P. Div., 137.*

As to a *quantum meruit* they have already received full compensation. The total freight was $15,929.52, and it has been paid entirely, except the amount of lighterage charges to which the respondents were subjected in remedying the default of the libelant.

Sixth.

WE RESPECTFULLY SUBMIT THAT THE DECREE OF THE UNITED STATES CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED, WITH COSTS, AND THAT THE MANDATE OF THIS COURT SHOULD ISSUE TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK, INSTRUCTING IT TO DISMISS THE LIBEL AND TO MAKE A DECREE IN FAVOR OF THE RESPONDENTS FOR THE COSTS OF ALL COURTS.

WILHELMUS MYNDERSE,
Advocate for Arbuckle Brothers.